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IN THE

Supreme Court of the United States

OCTOBER TERM, 1967

NO. 698

FARMERS CO-OPERATIVE ELEVATOR ASSOCIATION NON-STOCK OF BIG SPRINGS, NEBRASKA, a Cooperative Corporation, *Petitioner.*

VS.

ARTHUR C. STRAND, *Respondent*

On Petition For A Writ of Certiorari To The United States Court Of Appeals For The Eighth Circuit

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BRIEF OF THE RESPONDENT IN OPPOSITION

STATUTES INVOLVED

In addition to the statutes mentioned in the petitioner's brief, Nebraska's comparative negligence statute, Section 25-1151, set forth in Appendix "C", *infra,* p. 12, is pertinent to this matter.

QUESTIONS PRESENTED

Each of the "Questions Presented" set out in the petitioner's brief assumes an inaccurate or erroneous basic premise of fact or law. Thus, respondent submits the following questions involved:

A.

Is the owner-operator of a grain elevator liable for negligence resulting in injuries to an employee of a contractor working on the elevator when the owner-operator maintains control of the premises during completion of the work?

B.

Under the law of Nebraska is a workman engaged in the renovation of a building entitled to the protection of Nebraska's statutory safety regulations?

C.

May a litigant, via Rule 60(b), Federal Rules of Civil Procedure, avoid a binding stipulation entered into freely and voluntarily at trial when no exceptional circumstances, abuse of judicial discretion, or error in the stipulation itself have been shown?

D.

May an affidavit of a juror, concerning matters which inhere in the verdict, impeach a jury verdict in Nebraska?

STATEMENT OF THE CASE

Insufficiency and inaccuracy of petitioner's Statement of the Case require the following Statement by respondent:

The contract between petitioner and repsondent's employer, Wilmac Construction Company, was a "cost-plus" agreement with petitioner to pay all "costs" including all materials, supplies, structural accessories

and all other items required for the proper execution of the work. In keeping with this agreement, petitioner provided means of access to the headhouse of the elevator where respondent was working prior to his accident.

The headhouse was located some thirty feet above the floor of the elevator. It was reached by two means, both provided by petitioner:[1] (1) The ladder; (2) a man-lift. The man-lift carried only one person and was so constructed that a person in the headhouse could not raise the man-lift when it was on the ground. At the time of respondent's accident, the man-lift was on the ground.

Without dispute,[2] petitioner maintained control of the premises during construction. Petitioner operated the elevator during construction and on the accident date. This caused extreme conditions of dust in the headhouse. The dust landed on all surfaces, making them slick; it got in the eyes of workmen, hampering vision; and it clogged breath and lungs.

At about 6:30 p.m. on the accident date, respondent started down the ladder. The hazardous conditions of dust were present; it was also dark. Respondent had never descended the ladder under either condition. With the man-lift inaccessible, the ladder was re-

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[1] As The Circuit Court of Appeals noted: "The ladder had been installed by the defendant long prior to the commencement of the construction work and defendant had authorized its use by Wilmac's employees. It was also used by defendant's own employees in connection with the elevator operation."

[2] In the language of the Circuit Court: "On the day of the accident, the defendant was engaged in conducting its usual business operations on the premises while the construction work was progressing. The trial court found as a matter of law that the defendant had at least joint control over the elevator premises at the time of the accident and such determination is not challenged on this appeal." (Pet. App. 2).

spondent's only reasonable way out of the headhouse. Respondent slipped from the ladder and fell; the injuries paralyzed his body below the waist. The jury determined the factual questions for respondent in its verdict.

During the trial petitioner, with full possession of all relevant facts, waived foundation to certain safety codes adopted by the Nebraska Department of Labor. Four months later, petitioner sought to escape the waiver of foundation by moving for relief under Rule 60(b) Federal Rules of Civil Procedure, claiming the safety rules were not in effect at the time of the accident. Evidence offered by respondent at the hearing showed otherwise. For this, and other reasons,[3] the motion was overruled.

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[3] The Circuit Court stressed: "We believe the defendant is precluded from raising such issues here because of the stipulation made at the trial that regulations contained in Exhibit 26 were in effect at the time of the accident. The general rule is that parties are bound by stipulations voluntarily made from such stipulations after judgment is warranted only under exceptional circumstances. . . . Defendant * * * does not assert the stipulation was induced by any fraud or misconduct on the part of plaintiff or his counsel. Evidence was introduced at the 60(b) hearing from which it would appear that the regulations here in controversy were adopted in conformity with the administrative procedure act in 1964. There is also evidence which tends to show that on prior occasions various safety regulations including American Standard Safety Code for building construction were adopted * * * The record of adoption of the safety regulations was available to defendant in the State office in which it was filed. If defendant chose to raise the issue of lack of proper procedure in the adoption of the regulations, defendant should have made the necessary investigation or at least should have required plaintiff to lay the proper foundation for the introduction of Exhibit 26 * * * Exhibit 26 did not purport to show that compliance with the detailed requirements of the Nebraska administrative procedure act had been followed and hence defendant was not misled by the exhibit in this respect. (Pet. App. 12-13).

Finally, petitioner, after the verdict, submitted an affidavit concerning purported discussion and speculative statements of jurors on matters that in Nebraska, for years, have been held to inhere in the verdict. Indeed, examination of the affidavit (Pet. App. 28-29) makes it clear the jury was not, in fact, apprised of any fact of insurance or that "any award Strand might be granted against his employer would be unavailing."

ARGUMENT

Each of the questions petitioner seeks to raise is, simply, based on a premise or assumption incompatible with the facts in this case or Nebraska law.

The "safe ladder" duty imposed by Section 48-425, R.R.S., Neb. 1943, Reissue of 1960 (Pet. App. B. 41) is clearly placed upon owners in possession of buildings where work is being done. The Nebraska law on this point was carefully analyzed in *Continental Can Company* v. *Horton,* 250 F. 2d 637, cited at length in the opinion of the Circuit Court in the case at bar. The application of rule in the case at bar is supported by a long line of Nebraska cases, including *Strahl v. Miller,* 97 Neb. 820, 151 N.W. 952; *Stevens v. Luther,* 105 Neb. 184, 180 N.W. 87; *Winterson v. Pantel Realty Co.,* 135 Neb. 472, 282 N.W. 393; *Johnson v. Weborg,* 142 Neb. 516, 7 N.W. 2d 65; *Quist v. Duda,* 159 Neb. 393, 67 N.W. 2d 481; *Baer v. Schaap,* 168 Neb. 578, 97 N.W. 2d 207 and *Fosler v. Aden,* 175 Neb. 535, 122 N.W. 2d, 494.

Petitioner's misconception of Nebraska law is pointed up by its insistence, on pages 3 and 11 of its brief in this Court that Nebraska is "unequivocally a 'contributory negligence' jurisdiction." Since the

adoption of its comparative negligence statute in 1913, (Res. App. C. 1) Nebraska has certainly not been an unequivocal contributory negligence jurisdiction. The test under the statute is, of course, not based on absolute degrees of negligence but rather upon a comparative test of the relative degrees of negligence. *Andelt v. County of Shepherd,* 157 Neb. 527, 60 N.W. 2d 604. If, on all the evidence, reasonable minds might fairly differ in their conclusion as to the existence of contributory negligence or as to its degree being more than slight in the circumstances, the question is for the jury to determine. *Surface v. Safeway Stores, Inc.,* 8 Cir. 169 F. 2d 937, 939-940 (Neb.), Cf., *Halliday v. Raymond,* 147 Neb. 179, 181, 22 N.W. 2d 614.

Petitioner again, as it did before the Circuit Court, argues the fact question of respondent's actions, emphasizing respondent had ascended the ladder numerous times before the accident date. The argument ignores two vital points in respondent's testimony:

(1) He had never before descended the ladder under the conditions of darkness obtaining on the accident date.

(2) He had never before descended the ladder *after the elevator had been in operation causing the hazardous dust conditions.*

The instructions of the trial judge carefully delineated the duties and rights of the parties under Nebraska law of negligence (Record 64, 67, 68); the jury resolved the fact question adversely to the petitioner.

Petitioner's argument that the respondent assumed the risk of injury also ignores Nebraska law. The rule in Nebraska *even when no statute is involved,* is that assumption of risk is predicated upon an implied con-

sent to be treated negligently. If the person against whom the doctrine is applied is deprived of a choice in the matter, the risk is not assumed, although it may be encountered. *Schwab v. Allou Corporation,* 177 Neb. 342, 128 N.W. 2d 835. The respondent had no other reasonable way out of the headhouse than the defective ladder provided for him by the petitioner; a ladder rendered doubly—and latently—dangerous by petitioner's operations causing the dust conditions.

Moreover, by statute, Section 48-435, R.R.S. Neb. 1943, Reissue of 1960, (Pet. App. B. 41) the defense of assumption of risk is rendered unavailable to petitioner in this case.

Again, similarly, petitioner chooses to present to this court the fact question of just how the fall occured. Petitioner's viewpoint that the fall was impossible is expressed at page 11 of its current brief. Respondent's version is set out in the record (R. 24-25). The jury, as on the other factual issues petitioner seeks to appeal, believed the respondent.

Petitioner, as it did before the trial court and Circuit Court, continues to dispute the existence of safety codes adopted by the Department of Labor of the State of Nebraska long before the accident. No less than three times prior to the accident, (Supp. R. 74, 75) the Department of Labor adopted and filed in the office of the Secretary of State of Nebraska construction safety codes adopting by reference the American Standard Safety Code under consideration in this case.

By statute, Section 48-412, R.R.S. Neb. 1943, Reissue of 1960, (Pet. App. B. 41, 42) the Nebraska Department of Labor "is directed and empowered to

formulate, adopt, publish and enforce such safety codes, orders, rules and standards it deems necessary * * * " The manner and type of publication of such codes is left to the discretion of the Department of Labor by Section 84-903, R.R.S. Neb. 1943 (Pet. App. B. 43).

Nonetheless, even though the record shows the rules were in effect, neither the right of the Department of Labor to adopt the rules or the manner in which the rules were adopted are relevant or material issues here. The issue, and the only issue, is whether the petitioner, charged with full notice that safety regulations were adopted by reference can, at trial, waive foundation to the regulations and then, months later, seek relief under Rule 60(b) by claiming the standards were not in force because they were adopted by reference.

The exhibits (Pl. Ex. 26; R. App. 3; 36; Def. E. 12; R. App. 23; Supp. R. 69) and record of the trial (R. 36) show clearly no basis for relief under Rule 60(b) exists in this case and no abuse of judicial discretion occurred. See *Laird v. Air Carrier Engine Service,* 263 F. 2d 948; *Jackson v. United States,* 330 F. 2d 679; *Ringling Bros.-Barnum and Bailey C. Shows v. Olvera,* 119 F. 2d 584. The matter was thoroughly examined and petitioner's claim rejected, by both the trial court and the Circuit Court. Indeed, as the Circuit Court pointed out:

> "It is far from clear that any prejudical error resulted from the giving of the instructions based upon the safety code standard. An ample basis existed under the record for a finding of negligence apart from the safety code items." (Pet. App. B. 14).

Finally, with reference to the affidavit of the juror, Morris, the law in Nebraska is, again, exactly the opposite of the position urged by petitioner. In the case of *Kohrt v. Hammond,* 160 Neb. 347, 70 N.W. 2d 102, the Nebraska Supreme Court ruled:

> "Complaint is made that there was talk in the jury room regarding insurance. The matter of insurance is not wholly relevant to the issues in this type of case. It is wholly impossible, however, to protect against the speculation and conjecture of jurors relative to this question. All have some personal information concerning it and it is too much to hope that it will not creep into a jury's discussion of the issue in this type of case. It is a matter which necessarily inheres in the verdict when it is based wholly on speculation and conjecture on the part of the jury. Affidavits of jurors may not be considered to impeach a verdict when the facts sought to be shown are such as would inhere in the verdict."

Cf. *Carpenter v. Sun Indemnity Co.,* 138 Neb. 552, 293 N.W. 400; *Koenig v. Frank's Plastering Company,* 227 Fed. Supp. 849 (Neb.) (1964).

CONCLUSION

Petitioner's application presents no basis for which a writ of certiorari should be granted. Rather, petitioner has simply presented again, argument on factual questions determined by the jury. The jury was fully and carefully instructed by the Trial Judge who had complete knowledge of relevant Nebraska law. The jury determined petitioner was negligent and that its negligence was the proximate cause of respondent's injuries. The United States Circuit Court of Appeals for the Eighth Circuit reviewed the entire

matter and unanimously agreed with the Trial Judge and jury.

The verdict and judgment have ample support in fact and law. The application for a writ of certiorari should be denied.

Respectfully submitted,

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APPENDIX C

25-1151. Actions for injuries to person or property; contributory negligence; comparative negligence. In all actions brought to recover damages for injuries to a person or to his property caused by the negligence of another, the fact that the plaintiff may have been guilty of contributory negligence shall not bar a recovery when the contributory negligence of the plaintiff was slight and the negligence of the defendant was gross in comparison, but the contributory negligence of the plaintiff shall be considered by the jury in the mitigation of damages in proportion to the amount of contributory negligence attributable to the plaintiff; and all questions of negligence and contributory negligence shall be for the jury.

Laws 1913, c. 124, Sec. 1, p. 311; R.S. 1913, Sec. 7892; C.S. 1922, Sec. 8834; C.S. 1929, Sec. 20-1151.